

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 12, 2010, Session

STATE OF TENNESSEE v. ALECIA DIANE COOPER

**Direct Appeal from the Circuit Court for Bedford County
No. 16624 Lee Russell, Judge**

No. M2009-00848-CCA-R3-CD - Filed February 16, 2010

The Defendant, Alecia Diane Cooper, pled guilty to one count of driving under the influence, a Class A misdemeanor, and the trial court sentenced her to eleven months and twenty-nine days in confinement at one hundred percent. The trial court provided, however, that it would release the Defendant after ninety days if the Defendant entered and completed an in-patient alcohol treatment facility. On appeal, the Defendant challenges the trial court's sentence of total confinement, as well as the legality of the provision shortening the Defendant's confinement if the Defendant completes treatment. After a thorough review of the evidence and the applicable authorities, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

John H. Norton, III, Shelbyville, Tennessee, for the Appellant, Alecia Diane Cooper.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; David H. Findley, Assistant Attorney General; Charles Crawford, District Attorney General; Richard Cawley, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

During the Defendant's plea submission hearing, the State set forth the following summary of the conduct underlying this appeal:

[L]ate in the evening of January the 26th, 2008, Officers Elliott and Henry

were on patrol here in Bedford County, headed northbound on 231 towards Murfreesboro. As they approached [a Lowe's store], they noticed a black Lincoln Navigator had crossed the center line. They then followed that Lincoln Navigator for a period of time.

As it approached the green light in front of Wal-Mart the vehicle came to almost a complete stop at the green light before continuing on. Between the light at Wal-Mart and the red light in front of Calsonic, as it continued north on 231, the vehicle crossed the center line at least three more occasions. And in fact, changed lanes abruptly from the turn lane back over to the driving lane as it approached the light.

The officers, after that red light, then activated their blue lights, pulled the Lincoln Navigator over, found [the Defendant] to be the driver of that vehicle.

Upon speaking to her, Officer Elliott detected an odor of alcohol, asked her if she had been drinking. She said that she had not. He got her out of the vehicle to check further upon the detection of alcohol.

Officer Henry then gave her field sobriety tasks, which she did not perform to the officer's satisfaction. They then asked her to take a blood alcohol test, which she did. And those results were sent off to the TBI lab. And they came back to be a .22 alcohol percentage.

Based on this conduct, the Defendant pled guilty to DUI, 1st offense, a Class A misdemeanor.

The following evidence was presented at the Defendant's sentencing hearing: According to several documents presented by the State, the Defendant was convicted of attempted assault and disorderly conduct, both Class C felonies, in 2005. Sixteen days before her conduct that resulted in the DUI conviction and sentence that is the subject of this appeal, she was arrested in Illinois for driving while intoxicated, a charge for which she was later convicted.

The Defendant's husband of three years, William W. Torrance, testified that, at the time of the conduct at issue, both he and the Defendant worked for Medline Industries, a medical device manufacturer and distributor based outside of Chicago, Illinois. Torrance hired the Defendant, a registered nurse with a masters degree in business, as a clinical nurse specialist. Although the Defendant maintained her primary residence in Shelbyville,

Tennessee, where her teenage daughter lived with her ex-husband, the Defendant's job at Medline required her either to be in Chicago or to travel around the country five days a week. According to Torrance, the Defendant spent time with her daughter every time she returned to Tennessee.

Torrance testified that, around the time of the Defendant's DUI in this case, the Defendant's job responsibilities had increased significantly. First, the Defendant was tasked with developing "several large initiatives" in a short period of time for Medline in response to regulatory changes instituted by the federal government. Also, the Defendant was serving as clinical editor for three magazines Medline published three times a year. These responsibilities were in addition to her usual responsibilities with the marketing department.

He testified that, based on these additional work pressures, the Defendant "had a need" to "ventilate some of the pressure that she was feeling at work and with life in general." According to Torrance, the Defendant expressed to him her perplexity over how she allowed herself to commit two DUIs and told him she would never drive under the influence again. Torrance reported that she had lived up to her resolution and that she had successfully completed outpatient rehabilitation. He testified that the Defendant was "way beyond . . . sorry" for driving under the influence and that her conviction had "devastated" her and was "the absolute worst thing that [had] ever happened to her."

On cross-examination, Torrance confirmed that the Illinois court disposing of her Illinois DUI charge ordered her to complete the outpatient rehabilitation the Defendant had completed. He confirmed she had completed no other treatment program.

Upon examination by the trial court, Torrance testified that the Defendant continued to use alcohol "very, very moderately." Also, he confirmed that he was arrested for DUI on the same night as the Defendant's arrest in this case.

William H. Newman, II, the Defendant's friend of thirty years, testified that, after the Defendant's arrest in this case, the Defendant expressed to him her remorse at having driven under the influence. Since her arrest, she usually consumed only club soda at social events, and when she did consume alcohol, she clearly announced that her husband would be driving. Newman had not seen the Defendant intoxicated since her arrest in this case.

On cross-examination, Newman testified he had never perceived the Defendant to have a problem with alcohol, but he said that the Defendant's job stress may have induced her to drink and drive in January 2008. Newman did not believe, however, that the Defendant would again use alcohol to deal with job stress because she was very remorseful and dedicated to self-rehabilitation.

Benjamin D. Brantley, a Shelbyville jeweler, testified that he began to have regular business dealings with the Defendant four years prior to sentencing, which placed him in weekly contact with the Defendant. He testified that the Defendant had always been a “helpful,” “good” friend to him through the years, occasionally providing medical advice. Bentley testified that after the Defendant’s arrest, he had only observed the Defendant consume soft drinks and iced tea at social events.

Thomas P. Powers, a Medline senior vice-president, was the Defendant’s supervisor for three years, up until the latter part of 2006. He described the Defendant as an “extremely valuable” employee. Powers had never observed the Defendant abuse alcohol; therefore, her DUI shocked him. He confirmed that the Defendant’s job responsibilities greatly increased in the latter part of 2007 due to new federal regulations and that she was also responsible for three Medline publications. On cross-examination, Powers conceded he did not spend time with the Defendant outside of work and consequently was ignorant of her private alcohol use.

William A. Cooper, the Defendant’s ex-husband, testified that he and the Defendant had two adult sons and one teenage daughter, of whom he shared joint custody with the Defendant. He and the Defendant were married for twenty five years, and they divorced three and a half years before sentencing in this case. Cooper testified that he had never seen the Defendant drunk during their marriage and that alcohol was not a factor in their divorce. He explained that, since the Defendant’s Medline job began requiring her to fly to and from Chicago, he would meet the Defendant at the airport with their teenage daughter to transfer custody for the weekend. Cooper testified that, during these transfers, nothing about the Defendant’s speech, conduct, or demeanor ever suggested that she was intoxicated. He described the Defendant as a “great mother,” saying he trusted her with their daughter’s safety “without question.”

On cross-examination, Cooper acknowledged that their daughter was in the Defendant’s custody the weekend in issue, though she was staying with a friend when the Defendant was arrested.

The Defendant, who was forty-nine at the time of sentencing, testified that, as the Senior Vice President of clinical services and marketing at Medline, her responsibilities include editing three magazines, developing clinical programs and solutions, training Medline’s sales force and clinicians, public speaking, making presentations, and performing research. She testified that she had never missed a day of work and that she worked remotely from home in order to comply with the trial court’s pre-trial travel ban.

The Defendant confirmed that part of her sentence for her Illinois DUI included completing a sixteen-week outpatient alcohol treatment program, which entailed attending

a two-hour session every week.

The Defendant testified that, while training to become a registered nurse, she did an eight-week rotation at an in-patient alcohol drug treatment program in 1980, where she observed chemically dependent patients. Based on her experience completing this rotation, the Defendant opined she had never been dependent upon alcohol because she did not drink alone, drink consistently, or binge drink. The Defendant testified she had never been diagnosed as an alcoholic.

The Defendant testified that, since her arrest in this case, she drinks one to two glasses of wine per week, and she never drives after drinking alcohol. She stated she had not consumed alcohol in the two weeks preceding the sentencing hearing and had experienced no problems due to the abstention.

The Defendant expressed her remorse at having driven under the influence, stating as follows:

I am so incredibly sorry that those things happened. And I am so ashamed that they happened. I can't believe that they happened. And they will never happen again. And they haven't since then. I just cannot explain how much remorse I have for those two events. It's been the worst thing that's ever happened to me in my life. And I have paid and continue to pay dearly for them.

On cross-examination, the Defendant said she had four glasses of wine before her Illinois DUI arrest and two glasses of wine before her DUI arrest in this case. She acknowledged that her blood-alcohol level of .22 in this case strongly suggested she consumed more than two glasses of wine. The Defendant explained that she did not cease drinking entirely after her arrest because she was not an alcoholic. She said she did, however, "change[] [her] habit completely" after her arrest.

Upon examination by the trial court, the Defendant agreed that only two glasses of wine could not possibly cause a blood-alcohol level of .22. She testified, however, that she only remembered ordering two glasses and that her receipt reflects that she paid for only two glasses of wine. She testified she did not feel intoxicated when she got in her vehicle shortly before she was arrested. The Defendant returned to the restaurant that served her alcohol on the night at issue and spoke with her waitress, who insisted she served the Defendant only two glasses of wine. The Defendant posited that the waitress had refilled her glass without charging her but feared admitting this. She explained that she may not have recognized the signs of her intoxication that night because she was exhausted.

Based on this evidence, the trial court ordered the Defendant to serve one hundred percent of her eleven month, twenty-nine day sentence in confinement, with the provision that after ninety days of service she could apply for furlough to attend in-patient rehabilitation and, upon successful completion, serve the remainder of her sentence on probation in an after-care program. It is from this judgment ordering total confinement that the Defendant now appeals.

II. Analysis

On appeal, the Defendant contends the trial court erred when it ordered the Defendant to serve her sentence at one hundred percent; failed to consider relevant misdemeanor sentencing principles; and improperly attached a condition that, if complied with, reduced her release eligibility. The State responds that the Defendant's pattern of alcohol abuse supports the trial court's sentence of total confinement; that the trial court considered the appropriate sentencing principles, and that the condition attached to the Defendant's sentencing complies with Tennessee sentencing principles.

Misdemeanor sentences must be specific and in accordance with the principles, purposes, and goals of the Criminal Sentencing Reform Act. T.C.A. §§ 40-35-104, -302 (2006); *State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995). We review misdemeanor sentencing de novo with a presumption of correctness. T.C.A. § 40-35-401(d) (2006). “[T]he presumption of correctness ... is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm’n Cmts (2006).

The misdemeanor offender must be sentenced to an authorized determinant sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. T.C.A. § 40-35-302. A convicted misdemeanant has no presumption of entitlement to a minimum sentence, and trial courts are afforded considerable latitude in misdemeanor sentencing. *State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999); *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); *State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). However, the mandatory sentence for DUI, first offense, is eleven months, twenty-nine days, with a minimum of forty-eight hours served in confinement. *See* T.C.A. § 55-10-403(a)(1) (2006); *see also State v. Troutman*, 979 S.W.2d 271, 273 (Tenn. 1998) (“A defendant convicted of DUI automatically receives a sentence of eleven months and twenty-nine days.”). The trial court's sole function in setting the length of a sentence for a DUI conviction is “to determine what period above the minimum period of incarceration established by statute, if any, is to be suspended.” *State v. Combs*, 945 S.W.2d 770, 774

(Tenn. Crim. App. 1996).

Although under the Criminal Sentencing Reform Act a trial court generally should not require a misdemeanor offender to serve more than seventy-five percent of his sentence in confinement, a trial court may sentence a DUI offender to serve the maximum punishment for the offense, so long as the imposition of that sentence is in accordance with the principles and purposes of the Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-302(d) (2006) (imposing seventy-five percent service cap on misdemeanor sentences); T.C.A. § 55-10-403(m) (2006); *Palmer*, 902 S.W.2d at 393-94 (holding that section 40-35-302(d) does not apply to DUI sentences). The misdemeanor sentencing statute requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served in “actual confinement” prior to “consideration for work release, furlough, trusty status and related rehabilitative programs.” T.C.A. § 40-35-302(d) (2006); *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998). A trial court may set a percentage to be served in confinement while providing that, if the defendant complies with certain conditions, the time remaining under the sentence will be suspended. *See State v. Timothy Todd Webb*, No. 02C01-9708-CC-00295, 1998 WL WL464894 (Tenn. Crim. App., at Jackson, Aug. 11, 1998), *no Tenn. R. App. P. 11 application filed*.

In this case, after hearing the evidence presented at the sentencing hearing, the trial court found that the Defendant’s past criminal convictions demonstrated her tendency to behave erratically and out of line with her education and background; that her accumulation of two DUI charges in one month indicated a disregard for the safety of the public; that her lack of awareness of or explanation for her intoxication on the night in issue suggested she had an alcohol abuse problem; that she disregarded the safety of the public by driving while intoxicated on the busiest street in Bedford County; and that her denial that she had an alcohol abuse problem demonstrated her lack of potential for rehabilitation:

There is simply no doubt in my mind that there is an alcohol problem here. I’m mystified by the whole tenor and tone of this sentencing hearing. It was as if this lady had been charged with being an alcoholic, when what she was charged with was driving on the busiest street and highway in Bedford County, at a time when she was .22.

She thinks she had only a couple of glasses of wine. But if she didn’t, it was because of that waitress, who never put it on the ticket, but for some reason, that waitress, free of charge, just kept refilling her glass. But even though two glasses is all she has generally, she didn’t detect the difference in how she felt when she was a .22 and how she feels when she drinks a couple of glasses of wine. So, Ms. Cooper is still steadfastly in denial about her

situation.

We have all known many gifted people, including lawyers, including judges who were alcoholics, and their families didn't know it, who remained highly productive work wise and yet had the problem, who were even good parents and had the problem.

And I don't doubt that she is a gifted person. Her CV certainly suggests that. Unfortunately, she is a gifted person with an as yet unrecognized problem.

This is a misdemeanor, and, therefore, we are not strictly required to follow the sentencing guidelines. However, they remain helpful. We know the maximum is 11, 29 at 100 percent.

She has a past—she has a problem—this is a first offense, but we know that in a very short period of time, in fact, she had two DUIs. We also know about her past conviction, which was for a minor offense.

What's troubling to me, because I remember the facts so well, having presided over that earlier trial, she behaved herself on that occasion very inconsistently with someone who has her gifts, her education, her background. That's not the way she acted at the celebration on that particular occasion.

Based upon these findings, as well as the Defendant's good employment history, the trial court ordered the Defendant to serve her entire sentence of eleven months and twenty-nine days in confinement, with the provision that after ninety days of service she could apply for furlough to attend in-patient rehabilitation and, upon successful completion, serve the remainder of her sentence on probation in an after-care program.

We conclude that the record does not preponderate against the trial court's factual findings. First, the Defendant has two prior criminal convictions: one for attempted assault and one for disorderly conduct. Although these two prior convictions are class C misdemeanors, this conduct is in sharp contrast to the professional image of the Defendant given by the witnesses at sentencing. Next, the Defendant's conduct in this case occurred only two weeks after she was arrested for drunk driving in Illinois. The close proximity of these two offenses shows a clear lack of recognition by the Defendant of her dangerous behavior and a strong disregard for the safety of the public. Similarly, the Defendant, who said she routinely drank two glasses of wine, as she said she did on the night in question, testified that she did not feel intoxicated, though her blood alcohol level was .22. We agree

with the trial court that the Defendant's inability to either recognize or explain her intoxication indicates she has an alcohol abuse issue. Finally, we agree with the trial court that the Defendant's adamant denial of an alcohol abuse issue diminishes her potential for rehabilitation.

We conclude that the trial court properly sentenced the Defendant. In referencing the Defendant's past criminal conduct, the close proximity of her two DUIs, and her denial of having an alcohol abuse problem, the trial court considered the enhancement factors of the Criminal Sentencing Reform Act of 1989. *See* T.C.A. § 40-35-302(d); T.C.A. § 40-35-114 (2006). In referencing the Defendant's education, job performance, and work ethic, the trial court considered the mitigating factors of the Act. *See* T.C.A. § 40-35-302(d); T.C.A. § 40-35-113 (2006). Also, the trial court considered the Defendant's potential for rehabilitation when it called attention to the Defendant's lack of explanation for how she became drunk on the night in question and her statement that she did not feel intoxicated in spite of having a .22 blood alcohol level. Taking these factors into consideration, the trial court determined that the Defendant should serve her entire sentence in confinement, unless she elected to enter and complete in-patient alcohol treatment. The record demonstrates that, in ordering total confinement, the trial court considered sentencing principles and the relevant facts and circumstances surrounding the Defendant's DUI. *See* T.C.A. § 40-35-302(d). Therefore, the Defendant has not shown that her sentence is improper. *See* T.C.A. § 40-35-401. As such, we presume the trial court's sentence is correct. *See* T.C.A. § 40-35-401(d). The Defendant is not entitled to relief on this issue.

III. Conclusion

After reviewing the record and applicable law, we conclude the trial court properly sentenced the Defendant. As such, we affirm the trial court's judgment.

ROBERT W. WEDEMEYER, JUDGE